80-1537

No._____

Office-Supreme Court, U.S.
FILED
MAR 9 1981
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PITTSTON STEVEDORING CORP.,

Petitioner,

against

JACK A. DOCA and FANNIE C. DOCA,
MARINA MERCANTE NICARAGUENSE, S.A.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JOSEPH E. DONAT

Questions Presented

1. Whether, it having been judicially determined by the Court of Appeals that longshoreman-respondent was in fact the employee of petitioner, it is now required that any action against such employer be dismissed in its entirety by reason of the exclusivity provisions of Section 905(a) of the Longshoremen's and Harborworkers' Compensation Act. (33 U.S.C. §901, et seq.)

2. Whether, if it is determined that longshoreman-respondent was not an employee of petitioner, Pittston, and therefore no duties under OSHA were owed to him, the judgment should be vacated as there is no other basis for liability against petitioner Pittston.

List of Additional Interested Parties

In addition to the parties set forth in the caption of this litigation upon information and belief, the present GOVERNMENT OF NICARAGUA and its current governmentally controlled steamship company, NAVIERES NICARAGUENSE S.A. (NANICA) as successor in interest to respondent Marina Mercante Nicaraguense S.A. (Mamenic Lines), and Marina's underwriters, THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LTD., (written through THE MILLER INSURANCE CLUB in London, England whose New York representative is TRANSPORT MUTUAL SERVICES INC.,) as well as Doca's general employer, HAMILTON TERMINAL COMPANY and its insurer currently unknown to the petitioner and petitioner's insurers, THE HOME INDEMNITY COMPANY, and THE ST. PAUL INSURANCE COMPANY, also may have an interest in the outcome of this litigation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the District Court reported at 474 F. Supp. 751 (S.D.N.Y., 1979) appears in Appendix B hereto. The opinion of the Court of Appeals reported at 634 F. 2d 30 (2 Cir. 1980) appears in Appendix A hereto. The judgment of the Court of Appeals appears in Appendix C hereto. The order of the Court of Appeals denying without opinion the petition for rehearing appears in Appendix D hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on October 1, 1980 affirming in part and remanding in part the judgment and opinion of the United States District Court for the Southern District of New York (Kevin T. Duffy, Judge) entered on July 11, 1979.* A timely petition for rehearing was subsequently denied without further opinion by the Court of Appeals on January 7, 1981 and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

Statutory Provisions Involved

United States Code, Title 33

§902 Definitions
See Appendix, p. 33a

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*Finality of an order or judgment is not a prerequisite to petitioning this Court for a writ of certiorari under 28 U.S.C. §1254 (1). *Land v. Dollar*, 300 U.S. 731 (1947). See also 12 Moore's Federal Practice ¶434.01.

United States Code, Title 33

§905 Exclusiveness of Liability
See Appendix, p. 33a

United States Code, Title 29

§652 Definitions
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§653 ***workmen's compensation law or common law or statutory rights, duties, or liabilities of employers and employees unaffected
See Appendix, p. 34a

Code of Federal Regulations, Title 29

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Statement of Case

On July 23, 1975 respondent Jack A. Doca (hereinafter "Doca") was *generally* employed as a cargo checker by Hamilton Terminal Company (hereinafter "Hamilton") and performing work on board the M/V "COSTA RICA" owned by respondent Marina Nicaraguense S.A. (hereinafter "Marina") when he was injured. (Appendix, p. 2a.) It is not disputed herein that respondent Doca's accident occurred aboard the M/V "COSTA RICA" while the vessel was moored in navigable waters of the United States.

Marina contracted with petitioner Pittston Stevedoring Company (hereinafter "Pittston") to unload the vessel, and Pittston in turn contracted with Hamilton to perform cargo checking services. (Appendix, p. 2a). At the time of his injury Doca was aboard the vessel at the joint request and direction of both a Hamilton and Pittston supervisor to check cargo in a hatch. (Appendix, p. 2a) It is contended by petitioner Pittston that based upon the facts in the trial record and even more significantly based upon the judicial finding and determination in the

opinion of the United States Court of Appeals, Second Circuit, (Appendix pp. 4a-5a) respondent Jack Doca, was a *special* or borrowed employee of petitioner Pittston at the time of his accident.

The District Court sitting without a jury awarded the Docas damages totaling $669,127.00 finding both Marina and Pittston jointly and severally liable for such damages to the plaintiffs. (Appendix p. 3a) However, as to Marina and Pittston *inter se*, the trial Court found Marina to be 90% liable and Pittston 10% liable for plaintiff's accident (Appendix 3a). The liability of Pittston was based *solely* upon the violation of a regulation promulgated by the Occupational Safety and Health Administration, 29 C.F.R. §1918.91(a)(1979) which required stevedores to keep their work area free of "tripping or stumbling hazards." (Appendix, p. 4a) The liability of respondent Marina was based on its active negligence in first creating and thereafter continuing to permit the existence of an accumulation of paper and other debris in walking and working areas on the main deck of its M/V "COSTA RICA." (Appendix, p. 4a)

The District Court having based the liability of Pittston solely on breach of the OSHA regulation in question, (Appendix, p. 23a-24a) petitioner Pittston appealed to the United States Court of Appeals for the Second Circuit arguing that the OSHA regulations did not apply as Doca was not its employee. However, the Court of Appeals disagreed and affirmed the finding of liability against Pittston based upon the violation of such statutory regulation and thereafter, based on the District Court record, went on to find Doca to be a special or borrowed employee of Pittston by stating:

> "Pittston's argument that its duty does not run to Doca because Doca was not Pittston's employee cannot be maintained. Since Doca's company, Hamilton, was hired by Pittston, *Doca's relationship to Pittston was effectively that of an employee*, for purposes of the scope of the duty based on the OSHA regulation, especially since Doca was sent on the mission that led to his injury by a Pittston and a

Hamilton supervisor, acting together." (Appendix, pp. 4a-5a) (emphasis supplied)

The Second Circuit Court of Appeals remanded the litigation to the District Court solely for reassessment on a limited issue of damages having affirmed all issues of liability found by the District Court. (Appendix, p. 18a) No further proceedings in the District Court have, as yet, taken place.

Petitioner then moved for rehearing based on the Court of Appeals findings and decision that Doca was its employee. Petitioner pointed out that it was required that the Court of Appeals apply Section 905(a) of the Longshoremen's Act to precluded any liability, other than for compensation, against a stevedore-employer. Although the Second Circuit took the unusual step of calling for further briefs from the respondents herein on the rehearing petition, the rehearing of petitioner was subsequently denied without further opinion. (Appendix, p. 32a).

There also exists the derivative claim of respondent Jack Doca's wife, Fannie Doca for loss of consortium, whose right to recover, assuming liability, is not raised herein by reason of this Court's recent decision in *American Export Lines Inc. v. Alvez*, 446 U.S. 274 (1980).

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of this Court and other Courts of Appeals which have held that Section 905(a) of the Longshoremen's and Harborworkers' Compensation Act (33 U.S.C. 901 et seq.) provides the exclusive remedy against a stevedore-employer.

Reargument having been denied, petitioner does not question the finding of the Court of Appeals that Doca was, in effect, a borrowed servant. *The Standard Oil Company v. Anderson*, 212 U.S. 215, 29 S.Ct. 252, 53 L. Ed. 480 (1909).

However, once such a determination was made, it is respectfully submitted that the Court of Appeals should not have proceeded to disregard the effect of the exclusivity provisions of Section 905 (a) of the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. §901 et seq., (hereinafter "Longshoremen's Act") which by its very terms preclude any liability on the part of the stevedore-employer other than for compensation benefits.

Such refusal by the Second Circuit Court of Appeals to apply Section 905(a) of the Longshoremen's Act when an OSHA employment nexus is found is in *direct conflict* with both the Fifth and Eighth Circuit Courts of Appeal. *Jeter v. St. Regis Paper Co.*, 507 F. 2d 973 (5th Cir. 1975); *Beaver v. Jacuzzi Brothers Inc.*, 454 F. 2d 284 (8th Cir. 1972); see also *Champagne v. Penrod Drilling Company*, 341 F. Supp. 1282, aff'd 459 F. 2d 1042, amended 462 F. 2d 1372, cert. den. 409 U.S. 1113, reh. den. 410 U.S. 948; *Thibodaux v. Atlantic Richfield Co.*, 580 F. 2d 841 (5th Cir. 1978), cert. den. 442 U.S. 909, 99 S. Ct. 2820, 60 L. Ed. 2d 274 (1979).

This Court, as well as a different panel of the Court of Appeals for the Second Circuit itself has recognized that compensation benefits are a longshoreman's sole remedy against his employer, regardless of negligence. *Edmonds v. Compagne Maritime Transatlantique*, 443 U.S. 256, 260 (1978); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977); *Zapico v. Bucyrus—Erie Co.*, 579 F. 2d 714 (2d Cir., 1978).

It is not contested that longshoreman Doca received compensation benefits by reason of his injury pursuant to the Longshoremen's Act. That Doca is an "employee" of Pittston, as that term is defined by both the Occupational Safety and Health Act, 29 U.S.C. §652 (b) as well as the Longshoremen's Act, 33 U.S.C. §902(3) is clear. Moreover, that Pittston is the "employer" of Doca, as that term is defined by the same statutes, is also clear. Compare 29 U.S.C. §652(5) and 33 U.S.C. §902(4).

In *Jeter* v. *St. Regis Paper Co.*, 507 F. 2d 973 (5th Cir. 1975), although the Court ultimately found that St. Regis was not an employer of the claimant Jeter, and that it was not obligated to comply with certain OSHA regulations concerning the work performed by him, it, nevertheless, recognized the very argument of appellant Pittston herein, when it stated:

> "Had there been sufficient facts of control*** the fact might have made St. Regis Jeter's employer and Jeter's exclusive remedy would have been workmen's compensation benefits, which he received. Cf. Biggart v. Texas Eastern Transmission Corp., 235 So. 2d 443 (Miss. 1970)." (507 F. 2d at 978)

Similarly, in *Beaver* v. *Jacuzzi Brothers, Inc.*, 454 F. 2d 284 (8th Cir. 1972), the Court wrote:

> "As a matter of common experience and of present business practices in our economy, it is clear that an employee may be coemployed by more than one employer even while doing the same work. Biggart v. Texas Eastern Transmission Corp., 235 So. 2d 443, 445 (Miss. 1970).
>
> *"As Jacuzzi Brothers was an employer within the meaning of the statute, plaintiff's sole remedy is that provided by the Workmen's Compensation Law."* 454 F. 2d 284 at 285 (emphasis supplied)

In *Champagne* v. *Penrod Drilling Company*, 341 F. Supp. 1282, aff'd 459 F. 2d 1042 amended 462 F. 2d 1372, cert. den. 409 U.S. 1113, reh. den. 410 U.S. 948, the District Court found that decedent, Paul LeBlanc, a welder employed by Terrebonne Welders, was, in fact, the borrowed servant of Penrod Drilling Company at the time of his death while working on an oil drilling platform owned and being constructed by Penrod in the Gulf of Mexico.

Having made such a determination, the Court went on to hold:

> "As such, LeBlanc was a borrowed or loaned employee and entitled to the benefits of the applicable compensation statute against Penrod, subject to the limitations imposed. *The exclusive remedy afforded by Title 33 U.S.C. §905 is such a limitation and this suit must be dismissed.* Ross v. Delta Drilling Company (E.D.La. 1962), 213 F. Supp. 270; Touchet v. Travelers (W.D.La. 1963), 221 F. Supp. 376." 341 F. Supp. 1282 at 1285 (emphasis supplied)

On appeal, the United States Court of Appeals for the Fifth Circuit, following such reasoning, wrote that: "It is our judgment that the findings of fact are supported by substantial evidence and that the legal conclusions reached are supported by the facts found." 459 F. 2d 1042. And, as indicated above certiorari was denied by this Court. 409 U.S. 1113.

This was also the rule in *Thibodaux* v. *Atlantic Richfield Co.*, 580 F. 2d 841 (5th Cir. 1978), cert. den., 442 U.S. 909, 99 S. Ct. 2820, 60 L.Ed. 2d 274 (1979) where the Court wrote: "If the LHWCA is applicable to this case, and if it is determined that the deceased was a 'borrowed employee' or 'borrowed servant' of ARCO, the plaintiff's exclusive remedy against ARCO will lie in the recovery of compensation benefits under the Act." 580 F. 2d 841 at 843.

In *Biggart* v. *Texas Eastern Transmission Corp.*, 235 So. 2d, 443 (Miss., 1970), relied upon by the Fifth Circuit in *Jeter* as well the Eighth Circuit in *Beaver*, the Supreme Court of Mississippi held that because decedent Biggart was an employee of both a pipeline contractor who paid him, as well as the pipeline owner who controlled him, therefore, the sole and exclusive remedy of his estate was under the Workmen's Compensation Act of Mississippi, which precluded any action against an employer.

Using as its guide the recognized authority in the field, *Larson on Workmen's Compensation Law*, the *Biggart* Court wrote:

> "This case is what Larson calls an "upside-down compensation case' in the form of a negligence action in which

> the employee is trying to get out from compensation coverage to escape the exclusive provisions of the act, and the employer is asserting compensation coverage. 1 Larson, Workmen's Compensation Law, §26.10 at 452.11 (1965). Reason and consistency required that we apply the provisions of the act and the decisions interpreting it with an equal hand, both where coverage is asserted and where the exclusive remedy provisions of the statute are involved . . ." 235 So. 2d 443 at 447.

The courts of New York State also follow such reasoning to preclude any liability on the part of an employer where a borrowed servant relationship exists. *Fallone* v. *Misericordia Hospital,* 23 A.D. 2d 222, 259 N.Y.S. 2d 947, aff'd, 17 N.Y. 2d 648, 269 N.Y.S. 2d 431, 216 N.E. 2d 594. As stated by the Court in *Matter of DeNoyer* v. *Cavanaugh,* 221 N.Y. 273 (1917), "The fact that a workman has a general and a special employer is not inconsistent with the relation of employer and employee between both of them and himself." See also, *Johnston* v. *International Freighting Corporation,* 274 App. Div. 728, 87 N.Y.S. 2d 297.

The Second Circuit having found as a fact, based on the District Court record, that Jack Doca was an employee of Pittston creates a conflict between the circuits and further violates the provisions of the Longshoremen's and Harborworkers Compensation Act.

2. Assuming, *arguendo* that respondent Jack Doca was not an employee of petitioner, Pittston, the Circuit Courts are presently in disagreement as to the applicability of the Occupational Safety & Health Act and regulations promulgated thereunder to a non-employer.

In the alternative if this Court finds that longshoreman-respondent Doca, was not an employee of Pittston it is contended by petitioner that OSHA regulations do not apply. The Con-

gressional purposes and policy of OSHA (29 U.S.C. §651 et seq.) set forth by Congress state inter alia that:

> Section 651
>
> (1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

Employees pursuant to OSHA (29 U.S.C. §652) are defined as:

> (6) The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce.

If it is determined that Doca is not an employee of Pittston, OSHA does not apply and cannot be used as a basis of liability against Pittston or other non-employers. *Horn v. C. L. Osborn Contracting Company,* 591 F. 2d 318 (5th Cir. 1979), reh. den. 595 F. 2d 1221; contra, *Marshall v. Knutson Construction Co.,* 566 F. 2d 596 (8th Cir. 1977).

Therefore, the judgment of liability against Pittston should be vacated in its entirety since there is no other finding of negligence in the District or Appellate Court decisions on which to base liability against Pittston.

CONCLUSION

For these reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 629—September Term, 1979
(Argued March 5, 1980 Decided October 1, 1980)
Docket No. 79-7626

JACK A. DOCA and FANNIE C. DOCA,

Plaintiffs-Appellees,

v.

MARINA MERCANTE NICARAGUENSE, S.A.
and PITTSTON STEVEDORING CORP.,

Defendants-Appellants.

Before:

FEINBERG, *Chief Judge,*
NEWMAN and KEARSE, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York (Kevin T. Duffy, Judge) holding shipowner and stevedoring company liable for injury to cargo checker under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901-950, and calculating damages for lost future wages by reducing the present value discount to reflect inflation.

Affirmed in part, vacated in part, and remanded.

VICTOR S. CICHANOWICZ, New York, N.Y. (Cichanowicz & Callan, New York, N.Y., on the brief), *for appellant Marina Mercante Nicaraguense, S.A.*

GEORGE G. KILARJIAN, New York, N.Y. (Bigham, Englar, Jones & Houston, New York, N.Y., on the brief), *for appellant Pittston Stevedoring Corp.*

MORRIS CIZNER, New York, N.Y. (Zimmerman & Zimmerman, New York, N.Y., on the brief), *for appellees.*

NEWMAN, *Circuit Judge:*

This appeal from a personal injury award, made pursuant to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§901-950 (1976), primarily requires consideration of the effect of inflation in determining damages for loss of future wages.

Plaintiff Doca was employed as a cargo checker by Hamilton Terminal Company. He was injured when he slipped and fell while carrying out his assigned duties aboard the M.V. Costa Rica. Defendant Marina Mercante Nicaraguense, S.A. ("Marina") is the owner of the ship; it hired defendant Pittston Stevedoring Company ("Pittston") to unload the vessel, and Pittston in turn hired Hamilton to perform certain services in connection with the unloading. Doca went aboard the Costa Rica at the joint request of a Pittston supervisor and a Hamilton supervisor to check the hatches for the presence of some metal pipe. The path to Hatch #4 along the offshore side of the vessel was surrounded by garbage, but there appeared to be a clear route through the center of it, covered with dunnage paper. In fact, there was a turnbuckle underneath the paper; as Doca proceeded toward Hatch #4, he tripped on the turnbuckle and struck his head on the coaming, or rim of the hatch. As a result of this fall, Doca suffered a cerebral concussion and cervical spine injury. This left

Doca with a series of neurological symptoms that were found to render him incapable of working, engaging in "most normal recreational activities," or having a normal sexual relationship with his wife.[1]

The District Court for the Southern District of New York (Kevin T. Duffy, Judge) found both the shipowner Marina and the stevedoring company Pittston negligent in causing Doca's injury, and, reflecting their relative responsibilities for the injury, found Marina liable for 90% and Pittston liable for 10% of damages totaling $669,127. These damages included, among other items, $352,560 for Doca's wages from the date of trial for the 12-year remainder of his working life and $15,000 for his wife's loss of consortium.

Marina and Pittston appeal the judgment, raising issues concerning both liability and damages. We affirm as to liability and remand for redetermination of loss future wages.

I. Liability

The liability issues are not substantial. The District Court's conclusion that both Marina and Pittston were negligent is fully supported by the evidence. The 1972 Amendments to LHWCA had the effect of applying general tort principles regarding owners and occupiers of land to the duty of a shipowner toward those who come aboard for business reasons. 33 U.S.C. §905; see H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4701-03; *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 507 (2d Cir. 1976), *Landon v. Lief Hoegh & Co.*, 521 F. 2d 756, 762 (2d Cir. 1975), *cert. denied,*

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[1]Doca's injuries were serious by themselves, but they were exacerbated by what the District Court found to be a post-traumatic conversion reaction. This reaction probably resulted from the fact that Doca had been injured previously, in 1950, when employed as a longshoreman, and had been unable to work for twelve years thereafter.

423 U.S. 1053 (1976). This duty is to maintain the property in a reasonably safe condition in the light of all the circumstances. See W. Prosser, Handbook of the Law of Torts §61 (4th ed. 1971); Restatement (Second) of Torts §343. In the present case, the ship's deck was clearly in an unsafe condition; this was not simply a matter of one turnbuckle being covered by some paper, but of a general obstruction of the walking area by various types of refuse. The ship's crew had created this hazard, and the ship was primarily responsible for it. Moreover, the crew was aware of the hazard, as it had been pointed out to them by Pittston's hatch foreman, who asked them to clean it up. The ship could have contracted with Pittston to clean the deck but it did not do so, and thus retained its basic responsibility. The finding that Marina was 90% responsible for the accident is amply supported.

Pittston's liability is based on a regulation, promulgated by the Occupational Safety and Health Administration, 29 C.F.R. §1918.91(a) (1979), which requires stevedores to keep their work area free of "tripping or stumbling hazards." The District Court held that this regulatory standard created a non-delegable duty to remove the hazard. The fact that the hazard was primarily the ship's responsibility does not excuse the stevedore from fulfilling its regulatory obligation; the stevedore was within its rights in asking the ship's crew to clean the deck, and presumably, it could have obtained monetary compensation for cleaning the deck itself. But since it continued working without making sure the deck was clean, it exposed itself to liability for violation of a statutorily established standard. See *Complaint of Allied Towing Corp.*, 416 F. Supp. 1207 (E.D. Va. 1976), *aff'd in part, vacated in part on other grounds*, 580 F.2d 702 (4th Cir. 1978) (LHWCA case); *Martin* v. *Herzog*, 228 N.Y. 164, 126 N.E. 814 (1920); W. Prosser, *supra*, §36 at 200-03.

Pittston's argument that its duty does not run to Doca because Doca was not Pittston's employee cannot be maintained. Since Doca's company, Hamilton, was hired by Pittston, Doca's

relationship to Pittston was effectively that of an employee, for purposes of the scope of the duty based on the OSHA regulation, especially since Doca was sent on the mission that led to his injury by a Pittston and a Hamilton supervisor, acting together.

The District Court was also justified in concluding that Doca was not contributorily negligent in taking the offshore route to Hatch #4, or in not looking under the paper. The evidence indicated that it is a standard safety procedure to walk on the offshore side of a ship when the ship is being unloaded, since cargo is lifted over the inshore side. Of course, Doca might have looked underneath the paper before he walked on it. But the District Court was entitled to conclude that this would have been more than the reasonable care required of a business invitee.

The District Court was also entitled to find that neither of the defendants had established a valid cross-claim for indemnity. Marina's contractual indemnity claim is defeated by the District Court's finding that Pittston's failure to observe the obligation of the OSHA regulation does not establish breach of a warranty of workmanship performance, even though it suffices to establish Pittston's negligence. The District Court also did not err in finding, alternatively, that Marina's own negligence, in the circumstances of this case, was sufficient to preclude an indemnity claim. See *Lopez v. Oldendorf*, 545 F.2d 836 (2d Cir. 1976), *cert. denied*, 431 U.S. 938 (1977); *Hurdrich v. Eastmount Shipping Corp.*, 503 F.2d 397 (2d Cir. 1974). Finally, the District Court was entitled to reject Pittston's tort theory indemnity claim, apparently predicated on the contention that Marina's negligence was active and Pittston's only passive. See *Tri-State Oil Tool Industries, Inc. v. Delta Marine Drilling Co.*, 410 F.2d 178 (5th Cir. 1969), and cases there cited. The evidence of the omissions of both defendants justified the 90-10 allocation, properly reflecting the relative responsibility of the two tortfeasors, but did not compel a finding that Pittston must be relieved of its share of the damages.

II. Damages

One of the damage issues—whether an injured worker's wife can recover for loss of consortium under the LHWCA—has now been authoritatively decided by *American Export Lines, Inc. v. Alvez*, 48 U.S.L.W. 4501 (U.S. May 12, 1980). Appellant's challenge to the $15,000 loss of consortium component of the damage award is therefore rejected.[2]

The final and most significant question raised by this appeal is whether and to what extent an award for lost future wages should be adjusted because of inflation.[3] If an adjustment for inflation is to be made, two approaches are available. Under the first method the projection of current wages is increased to reflect the fact that the employee would have received cost of living increases to keep pace with inflation. The sum of those increased annual wage figures is then discounted to present value by the prevailing interest rate. See *United States v. English*, 521 F.2d 63, 75 (9th Cir. 1975). Under the second method the discount rate is decreased below the prevailing interest rate to reflect the estimated rate of inflation. This reduced discount rate is then applied to the sum of the current wages projected to continue for each of the years for which wages will be lost. See *Feldman v. Allegheny Airlines, Inc.*, 382 F. Supp. 1271 (D. Conn. 1974), *aff'd*, 524 F.2d 384, 387-88 (2d Cir. 1975). If the same estimated inflation rate is used, the "outcome of the calculation under either approach would be very nearly identical," *Feldman, supra*, 524 F.2d at 391 (Friendly, J., concurring).

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[2]Liability in *Alvez* was grounded upon both negligence and unseaworthiness, the accident having occurred prior to the 1972 LHWCA amendments, which eliminated liability to longshoremen based on unseaworthiness. However, the 1972 amendments leave unaffected the Supreme Court's holding that damages for loss of consortium are available, under general maritime law, when liability is based on negligence.

[3]The defendants advance no serious objections to the award for wages lost prior to trial or for pain and suffering, and they stipulated the amount of medical costs.

In this case the District Court took inflation into account, to an unspecified extent, apparently by using the second approach and adjusting for future inflation by decreasing the present value discount. The Court did not provide a computation for its award for loss of future earnings; however, Judge Duffy stated that he had reached his result by "considering both probability of continued inflation and a discount to present value." Doca infers that Judge Duffy used a discount factor of 1%.[4] Defendants object to this computation for lack of evidence to support an estimate of future inflation and, more fundamentally, on the ground that any adjustment for inflation is impermissible. Since the significance of inflation on damage awards for lost future wages seems to be as persistent a problem as inflation itself, the matter merits some examination.

In this Circuit, the issue has been considered but not resolved. In *McWeeney v. New York, New Haven, & Hartford R.R. Co.*, 282 F.2d 34 (2d Cir.) (*en banc*), *cert. denied*, 364 U.S. 870 (1960), the issue was whether the calculation of lost future wages should be made on the basis of gross wages or net wages after deduction for income taxes. In rejecting a deduction for taxes, but see *Norfolk and Western Railway v. Liepelt*, —— S. Ct. —— (1980), this Court noted that whatever benefit this gives to plaintiffs is partially offset by the absence of an upward

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[4]Doca derives this 1% discount rate in the following manner. The difference between the award for lost wages, $352,560, and Doca's projection of future lost wages, $394,861. This difference represents approximately 1% of $352,560, multiplied by the 12 years for which future wages will be lost. Expressed as a formula, the computation would have been $x + (12i)\ x = w$, where x is the discounted value, i is the interest rate, and w is the projection of total future wages. If the District Court applied a 1% rate in this fashion (and we cannot be certain if the award for lost future wages was determined on this basis), the discount factor was incorrectly applied. The correct method is to apply to the future wages for each year a discount factor of $1/(1 + i)^n$, where i is the interest rate and n is the year for which present value of income is sought. *See Dullard v. Berkeley Associates Co., supra*, 606 F.2d at 895 n.4. The discounted amounts for each year are then added together to determine the total award. Standard tables are available to avoid the need for calculations.

adjustment for inflation.[5] A decade later in *Yodice v. Koninklijke Nederlandsche Stoomboot Maatschappij*, 443 F.2d 76 (2d Cir. 1971), a damage award for lost wages was reversed for reasons that included the failure to apply any discount for present value. Judge Firnedly presciently noted that "if inflation should continue at its present pace, courts may have to reconsider the propriety of the long recognized charge with respect to discount." *Id.* at 79.

More recently this Court, in a diversity case. approved District Judge Blumenfeld's use of an " 'inflation-adjusted discount rate' " of 1.5%. *Feldman v. Allegheny Airlines, Inc., supra,* 524 F.2d at 387. This rate was determined by subtracting the average annual change in the consumer price index over each of several periods of years from the effective annual interest on government bonds held during each of the same periods, and then selecting the average of the rates resulting from these subtractions. *Feldman v. Allegheny Airlines, Inc., supra,* 382 F. Supp. at 1306-12. The purpose of this method was to determine the " 'real yield' " of money, the portion of interest charged on virtually risk-free investments that represents only the real cost of the money and not the additional cost the lender exacts as a hedge against future inflation. *Id.* at 1293. Judge Friendly concurred *dubitante,* noting that the decision represented a prediction as to unsettled state law and not "a precedent on the inflation problem in a case arising under federal law." 524 F.2d at 390, 393. In another diversity case, *Dullard v. Berkeley Associates Co.,* 606 F.2d 890, 896 (2d Cir. 1979), this Court was willing to assume the propriety of an inflation-adjusted discount rate only for purposes of ruling that even with such an adjustment applicable to lost future wages, the total award in question was excessive. Most recently, the Court, in a Federal Tort Claims Act case, approved use of a present value discount rate that had been reduced to 5% from the prevailing interest rate

[5]The other factor mentioned in *McWeeney* as offsetting the absence of a deduction for income taxes is the significant portion of the plaintiff's award that will be taken by the attorney's contingent fee 282 F.2d at 38.

to reflect future inflation. *Espana v. United States*, 616 F.2d 41 (2d Cir. 1980).

Among other courts, there has been a growing recognition that inflation should be taken into account in damage calculations. At least four federal Courts of Appeals have explicitly so ruled, see *Steckler v. United States*, 549 F.2d 1375-78 (10th Cir. 1977); *United States v. English, supra*, 521 F.2d at 72-76; *Riha v. Jasper Blackburn Corp.*, 516 F.2d 840, 843-45 (8th Cir. 1975); *Bach v. Penn Central Transportation Co.*, 502 F.2d 1112, 1122 (6th Cir. 1974),[6] as have a number of state courts, see, *e.g.*, *Beaulieu v. Elliot*, 434 P.2d 665 (Alas. 1967); *Schnebly v. Baker*, 217 N.W. 2d 708 (Iowa 1974); *Halliburton Co. v. Olivas*, 517 S.W. 2d 349 (Tex. Civ. App. 1974). In addition, the commentators generally favor this position. See Dennis, Sirmon & Drinkwater, *Wrongful Death Damages*, 47 Miss. L.J. 173 (1976); Formuzis & O'Donnell, *inflation and the Valuation of Future Economic Losses*, 38 Mont. L. Rev. 297 (1977); Henderson, *The Consideration of Increased Productivity and the Discounting of Future Earnings to Present Value*, 20 S.D.L. Rev. 307 (1975); Hopkins, *Economics and Impaired Earning Capacity in Personal Injury Cases*, 44 Wash. L. Rev. 351 (1969); Note, *Future Inflation, Prospective Damages, and the Circuit Courts*, 63 Va. L. Rev. 105 (1977).

Though the Supreme Court has yet to rule definitively on the issue, it clearly indicated its approval of including inflation estimates in future wage loss awards in *Norfolk and Western Rail-*

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[6]Technically, only *Bach*, a Federal Employers' Liability Act suit, was decided under federal law. *English* and *Steckler* were cases brought under the Federal Tort Claims Act, to which local law applied, and *Riha* was a diversity case applying Nebraska law. However, in all these cases, the relevance of inflation was considered in light of general principles, without reference to any particular source of law. *See* Note, *Future Inflation, Prospective Damages, and the Circuit Courts*, 63 Va. L. Rev. 105 (1977). *See also Turcotte v. Ford Motor Co.*, 494 F.2d 173, 186-7 (1st Cir. 1974), explicitly relying on state law. *Cf. Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300, 308-313 (5th Cir. 1976) (Wisdom, J., concurring).

way v. Liepelt. supra. The issue in that case, as in *McWeeney,* was whether lost future wages in an F.E.L.A. case should be estimated without deduction for estimated income taxes. The Court ruled that such a reduction should be made. The opinion is instructive on the issue of inflation for two reasons. First, the Court noted that the plaintiff's economic expert had estimated that the lost future earnings would have increased by five percent a year until the wage-earners' retirement. More significantly, the Court rejected the argument that reduction for future income taxes would be too speculative by noting that other aspects of a damage award computation, specifically including "future inflation," are also matters of "estimate and prediction." ——S. Ct. at ——. Thus, the Court not only noted that the award included an estimate for inflation, but also used the reasonableness of making such an estimate as support for similar estimates of future taxes. See also *Grunenthal v. Long Island R. Co.,* 393 U.S. 156 (1968), in which the Court approved a damage award based upon anticipated wage increases attributable to inflation.

Although the view that inflation should be considered is clearly on the increase, several federal courts including three Courts of Appeals, have prohibited the adjustment of awards for future wages to account for inflation. See *Johnson v. Penrod Drilling Co.,* 510 F.2d 234 (5th Cir. 1975) (*en banc*); *Magill v. Westinghouse Electric Corp.,* 464 F.2d 294, 299-301 (3d Cir. 1972); *Williams v. United States,* 435 F.2d 804 (1st Cir. 1970). The principal rationale for these decisions is that estimates of future inflation are too speculative to serve as a basis for calculating damages. See *Penrod, supra,* 510 F.2d at 241; *Magill, supra,* 464 F.2d at 300; *Williams, supra,* 435 F.2d at 807.

We believe that the developing majority view is sound and that inflation should be considered in estimating the present value of lost future wages. According to the figures computed by the Bureau of Labor Statistics, United States Department of Labor, inflation has become a constant feature of our modern economy. The Consumer Price Index, perhaps the leading indicator of

inflation, has increased in all but two years since the beginning of World War II, and in every year since 1955. This increase was particularly pronounced during the past decade, when the Index increased by five times as much as it had during the previous decade. In 1979, the year in which the District Court decided this case, the average annual Consumer Price Index was 217.4, compared to 100 in 1967, the base year, and 72.1 in 1950.[7] Whether this trend has become an inherent feature of the international economy, irreversible by governmental action, is a subject of spirited debate among economists. See Friedman, *The Role of Money*, 58 Am. Econ. Rev. 1 (1968); Gordon, *Recent Development in the Theory of Inflation and Unemployment in Modern Macro-Economics* (Parkin, ed. 1979); Kaldor, *Economic Growth and the Problem of Inflation*, in N. Kaldor, Essays on Economic Policy 166 (1965). But there is broad agreement that our economy, by its very nature, is subject to strong and persistent inflationary pressures, and that the complete elimination of inflation would require Draconian measures, at the very least. See T. Dernbury & D. McDougal, *Macroeconomics* 287-96 (5th ed. 1976); D. Nichols & C. Reynolds, *Principles of Economics* 485-95 (1971); L. Reynolds, *Economics* 180-87 (4th ed. 1973); P. Samuelson, *Economics* 820-37 (1976). In short, courts cannot fail to recognize that inflation is a dominant factor on the current economic scene and, despite episodic recessions, is likely to be so for the foreseeable future.

To be sure, the idea that a person's future income will increase in dollar amount is a prediction, one based largely on our inductive assumption that the future will resemble the past. But using inductive inferences about economic conditions to ad-

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[7]Thus, if Doca had received a damage award for twelve years' future wages in 1967, fully discounted to present value at then prevailing interest rates, and had invested this award at those prevailing interest rates with the intention of drawing out one-twelfth each year, his yearly amount, despite the interest, would have declined steadily in purchasing power. For the final year, 1979, the money would have been worth only 42% of what it was worth when the award was made.

just the value of an award for lost future income is hardly novel. In fact, it underlies the practice of discounting future lost wages to the present value of the right to receive such wages. This practice, first required by the Supreme Court in 1916, *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485 (1916), and routinely followed by courts throughout the nation ever since, see E. Devitt & C. Blackmar, Federal Jury Practice & Instructions §85.13 (1976); Note, *supra*, 63 Va. L. Rev. 105, rests on the inductive inference that interest rates will continue at their present level or above. Discounting to present value determines the amount of money that will produce the lost future wages if the lump sum award (and any interest it earns) is invested at prevailing interest rates. If interest rates decline after the lump sum award is received, the plaintiff will normally fail to realize the full dollar amount of the lost future wages.[8] If it is permissible, indeed required by *Kelly*, to make a prediction about interest rates, it seems as reasonable to make a prediction about inflation as well. See *Steckler, supra*, 549 F.2d at 1377.

In fact, as Judge Blumenfeld demonstrates by the data collected in *Feldman*, there is a fairly constant relationship between interest and inflation rates, so that it is more reasonable to make a prediction about the relationship of both rates than about the level of interest rates alone. Discounting without regard to

[8]At a minimum the plaintiff will earn compound interest only at the reduced prevailing interest rate. If the plaintiff invests his lump-sum award (plus earned interest) annually, he will also suffer a decrease of simple interest because of the reduced rates. It is possible for the plaintiff to avoid this latter reduction by investing his lump sum-award in long-term bonds, corresponding to the length of time for which the wages are lost. Yet if the plaintiff makes that type of investment, he takes the risk that if interest rates increase, the market value of his bonds will decrease, and he will suffer a loss each time he sells a bond to meet current needs. One way to avoid that risk is to purchase a series of bonds ranging in maturities from one year up to the number of years for which the wages were lost. That assures that each year's needs will be met from the proceeds of a maturing bond, without the risk of selling a bond at a discount. However, the average rate on such a series of short, medium, and long-term bonds will most likely be less than the rate on long-term bonds, which was used to discount the future wages to present value.

inflation charges the plaintiff for that portion of the prevailing cost of money that represents the lenders' anticipation of inflation without allowing the plaintiff an offsetting addition for inflation, either by increasing the sum to be discounted or reducing the discount rate. Or, to put it another way, discounting necessarily includes a prediction about inflation (the prediction made by those who determine the interest rate), and it is neither reasonable nor fair to use that prediction only to reduce an award instead of endeavoring to determine an award that approximates the present value of what the future wages would have been. Economics should not be an instrument for the undercompensation of plaintiffs. It should be used to achieve a realistic estimate of future conditions, so that an injured plaintiff can be compensated for his loss as fairly and completely as possible.[9]

The principal argument advanced against taking inflation into account is that it is too speculative. There can be no doubt that predicting next year's inflation rate is at least as hazardous a task as forecasting next year's weather. This concern about speculation persuades us to be rather cautious in determining the way in which inflation should be taken into account, but, for three reasons, is not sufficient to preclude any adjustment for inflation. First, the law of damages frequently recognizes the need to make some predictions about the future, despite the uncertainties of doing so. Estimates of lost future profits are an obvious example. See *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 564-67 (2d Cir. 1970). Second, since discounting future lost wages to present value uses an interest rate that reflects inflation, the issue is not whether inflation is too speculative to be

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[9]It is worth noting that when the Supreme Court declared its present value discount rule in 1916, it was able to look back on an era when prices, though fluctuating, were not generally increasing. The estimated Consumer Price Index for 1916 stood at 32.7, having varied between 25 and 51 during the course of the previous century. Looking backward over the past four decades from 1980, rather than 1916, reveals an entirely different economic landscape, in which prices have increased almost every year, often at an accelerating rate.

considered at all; it is whether inflation, as a component of interest rates, should be considered for the defendant (by discounting at the prevailing interest rate) but ignored for the plaintiff (by rejecting any compensating adjustment for inflation). Finally, and most important, as *Feldman* illustrates, it is entirely feasible to take inflation into account without making any prediction as to the specific level of future inflation rates. All that is needed is a prediction that in the future inflation rates will bear approximately the same relationship to long-term interest rates that they have in the past. Essentially the only premise for that prediction is that over the course of years investors in long-term bonds will demand returns that reflect the prospects of future inflation. They may guess wrong in some years and accept rates that fail to keep pace with inflation. "Yet common sense suggests," as Judge Friendly has pointed out, "that investors will not tolerate such a situation indefinitely." *Feldman, supra,* 524 F.2d at 392. These considerations persuade us that inflation is not too speculative to be taken into account in determining awards for future lost wages. See *Norfolk and Western Railway v. Liepelt, supra.*

The next question is how inflation should be considered. Courts have favored various methods, which can generally be divided into two basic categories. In the first category are those methods that submit the question of the inflation rate to the fact-finder, so that a separate determination is made in each case. In this category, one method treats the rate of future inflation as a fact to be proved by evidence, presumably expert opinion. See, *e.g., United States v. English, supra,* 521 F.2d at 75-76. Another method forbids evidence, but permits the fact-finder to apply his own knowledge and prediction in estimating a future inflation rate. See, *e.g., Bach v. Penn Central Transportation Co., supra,* 502 F.2d at 1122-23. A third method permits the fact-finder to apply his own knowledge but also permits expert testimony. See, *e.g., Riha v. Jasper Blackburn Corp., supra,* 516 F.2d at 845. In the other basic category are methods that remove the issue from the fact-finder and instead adopt a rule of

law that focuses on a constant relationship between inflation and interest rates. Using this approach, the Alaska Supreme Court held that the inflation rate will be assumed to equal the interest rate, thereby eliminating any discount for present value. See *Beaulieu v. Elliot, supra.* A somewhat different technique was used in *Feldman,* where it was observed that over a period of years the inflation rate bore a relatively constant relationship to the interest rate, averaging 1.5% less; the Court used this 1.5% rate as a discount rate, reflecting the true cost of money with the effect of inflation removed.

Having considered these alternatives, we are not prepared to require any one particular method by which inflation should be taken into account in estimating lost future wages. Predictive techniques are constantly being refined, as are methods of correctly assessing the immediate past. If litigants prefer to offer evidence as to future rates of both inflation and interest, they are entitled to do so. We note, however, that one virtue of the *Feldman* approach is that it lessens trial disputes concerning the future impact of inflation. The average accident trial should not be converted into a graduate seminar on economic forecasting. The adjusted discount rate approach of *Feldman* avoids all predictions about the level of future inflation, and focuses instead only on the relationship between the inflation rate and the interest rate. Since that relationship is relatively constant in periods of stable inflation, as the historical data set forth in *Feldman* reveal, it may frequently be possible for litigants to agree on an adjusted discount rate, derived from that type of historical date. Without requiring a particular adjusted rate, we suggest that a 2% discount rate normally be fair to both sides.

A 2% discount rate appears to be the estimate of the true cost of money appropriate for use in a computation whose purpose is to determine the present value of lost future wages. As Judge Blumenfeld recognized in *Feldman,* 2% is the real yield normally attainable during periods of low, stable rates of inflation. *Feldman, supra,* 382 F. Supp. at 1293, 1310 (Table A-II).

It is also a figure that lies within the narrow range bracketed by many economists as representing the true yield of money.[10] *Feldman* used the slightly lower rate of 1.5% to allow "a margin of error to compensate for unexpected increases in the rate of inflation which may depress long term real yields." *Id.* at 1294 (footnote omitted). It may well be that during periods of unusually high inflation rates, interest rates will lag somewhat behind the inflation rate, at least temporarily, with the result that the interest return on a discounted lump sum award will not fully keep pace with inflation.[11] But in such periods of high inflation, wages too will not keep pace with inflation. In the only three years since 1947 when the rate of the annual increase in the Consumer Price Index (CPI) exceeded 8%, the annual rate of wage increases (non-farm weekly earnings) has been

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[10]Although economists disagree over the validity of the assumption that the real rate of interest is constant and consequently independent of inflation, *cf.* Fama, *Interest Rates and Inflation: The Message in the Entrails,* 67 Amer. Econ. Rev. 487 (1977) (real rate constant) *with* Carlson, *Short-Term Interest Rates as Predicators of Inflation: A Comment,* 67 Amer. Econ. Rev. 469 (1977) (real rate varies), there is substantial opinion that during periods of stable rates of inflation, the real yield of money, whether constant or slightly fluctuating, is approximately 2%, as estimated in *Feldman.* As Sharpe has suggested, an appropriate period for determining investor expectations of inflation and real rates of return is 1959-1972, when actual real returns may have been fairly close to expected real returns. W. Sharpe, *Investments* 170 (1978). For this period the *Feldman* calculation approximates 2%. Moreover, studies by economists, though taking different positions concerning the relation between the real rate and expectations about inflation, have estimated that the real rate of interest was between 1.5% and 3% for a similar time frame. *See, e.g., Carlson, supra,* at 471 (expected real rate fluctuates around 2.5% during 1953-1975); Elliott, *Measuring the Expected Real Rate of Interest: An Exploration of Macro-economic Alternatives,* 67 Amer. Econ. Rev. 429, 440 (1977) (mean expected real rate 1.44% for 1960-1974); Gibson, *Interest Rates and Inflationary Expectations: New Evidence,* 62 Amer. Econ. Rev. 854, 856 (1972) (real rate between 2% and 3% during 1952-1970); *but cf.* W. Sharpe, *supra,* at 170 (extrapolating from 1976 study by Ibbotson & Sinquefield, average actual real rate 1.2% for 1959-1972).

[11]*See* I. Fisher, The Theory of Interest 43 (1930) ("[W]hen prices are rising, the rate of interest tends to be high but not as high as it should be to compensate for the rise.").

less than the annual rate of CPI increases by at least 3 percentage points; in all other years since 1947, wages have increased at a rate greater than the rate of increase in the CPI or at least at a rate within 1 percentage point of the CPI percentage increase.[12] Thus, since there is little reason to expect that injured plaintiffs would have received wage increases sufficient to keep pace with unusually high rates of inflation, a present value discount rate normally need not be reduced below 2% just to compensate for unusually high inflation. To do so would ignore the basic objective of selecting a present sum of money that will replace what the future wages would have been.

We emphasize that we are not requiring the use of an adjusted discount rate, nor specifying that when such a rate is used, it must be set at 2%. Litigants are free to account for inflation in other ways, or, if they use the adjusted discount rate approach, to offer evidence of a rate more appropriate than 2%. But in the hope that disputes about the appropriate rate may be minimized, we simply suggest the 2% rate as one that would normally be fair for the parties to agree upon, and we authorize district judges to use such a rate if the parties elect not to offer any evidence on the subject of either inflation or present value discount.

Obviously in this case the District Judge could not have been expected to anticipate this opinion. Nevertheless, his calculation of an award for lost future wages must be reconsidered for two reasons. First, if we assume, as the plaintiff urges, that a

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[12]For 1974, the annual rate of increase in the CPI was 10.97%, and the annual rate of increase in weekly non-farm wages was 6.44%. For 1975, the comparable figures were 9.14% and 5.67%; for 1979, 11.26% and 7.66%. These earnings figures and the summary for the years since 1974, expressed in the text, are derived from figures reported in Bureau of Labor Statistics, U.S. Dept. of Labor, *Employment and Earnings, United States, 1909-78* 3 (1979) (for years 1947-1976) and Bureau of Labor Statistics, U.S. Dept. of Labor, *Employment and Earnings Supplement Revised Establishment Data* 1-2 (August 1980) (for years 1977-1979). Price figures are derived from figures reported in *1980 Economic Report of the President* 159 (1980).

1% discount rate was used, there is nothing in the evidence to support a reduction of the discount rate from prevailing interest rates all the way down to 1%. As indicated, the lowest discount rate we are willing to approve, in the absence of historical date justifying a different rate, is 2%. Second, the District Court to some extent gave duplicate consideration to the impact of inflation. In estimating what Doca's future wages would have been, the Court took into account a post-trial wage increase of 80¢ an hour, specified in Doca's union contract to take effect on October 1, 1979. Having based future lost wages on this cost of living increase, the Court then further reflected the impact of inflation by reducing the discount rate to 1%. When a discount rate is adjusted to reflect inflation, it must be applied to a stream of earnings calculated without regard to inflation, even to a cost of living increase already scheduled to occur. The certainty of such an increase does not lessen the fact that it reflects inflation, which is already accounted for by the reduced discount rate.

We therefore vacate the damage award and remand to the District Court for recomputation of the award for lost future wages in accordance with this opinion. In all other respects the judgment is affirmed.

Affirmed in part, vacated in part, and remanded.

APPENDIX B

Opinion of the District Court

JACK A. DOCA and FANNIE C. DOCA, Plaintiffs,

v.

MARINA MERCANTE NICARAGUENSE S.A.
and PITTSTON STEVEDORING CORP., Defendants.

No. 75 Civ. 5312 (KTD).

United States District Court, S. D. New York.

July 11, 1979.

OPINION

KEVIN THOMAS DUFFY, District Judge:

The plaintiff, Jack A. Doca, sues the defendants Marina Mercante Nicaraguense, S.A. [hereinafter referred to as "Marina"] and Pittston Stevedoring Corporation [hereinafter referred to as "Pittston"] for personal injuries sustained by him on the M/V Costa Rica on July 23, 1975. Plaintiff Fannie C. Doca, Jack Doca's wife, sues both defendants for loss of consortium and Marina and Pittston have cross-claimed against each other. This case was originally brought as a diversity action and a jury impanelled, but at the close of the plaintiff's case, upon motion of defendant Marina, the jury was discharged and the matter transferred to the admiralty jurisdiction of the court.

FACTS

Jack Doca was employed as a longshoreman until a serious accident at work in 1950 left him temporarily paralyzed. Doca remained hospitalized after that accident for nearly two years, finally overcoming his paralysis and returning home. Shortly after being released from the hospital, Doca fathered his first child and in 1957 a second child was born to the Docas.

Opinion of the District Court

In 1962 Jack Doca obtained employment with Hamilton Terminal Company as a cargo checker, work considerably less strenuous than his previous position as a long-shoreman. Although a checker's job does not normally require him to leave the docks, Doca was sent aboard the M/V Costa Rica at about 2:00 p.m. on the afternoon of July 23, 1975 to determine if a particular load of cargo belonged on the ship. At the time, cargo from the dock was being loaded into the ship's #1, #2 and #4 hatches by Pittston employees.

Doca boarded the Costa Rica at the gangway between the ship's #2 and #3 hatches and proceeded to hatch #2. After being told by the hatch boss that the cargo did not belong in hatch #2, Doca went along the offshore side of hatch #3 toward the ship's #4 hatch. As Doca approached hatch #4 he found the passageway between the hatch coaming and the ship's outer railing blocked with refuse from the stevedoring operations. According to Doca, pipe, planks of wood and various piles of garbage laid along the ship's outer railing with dunnage paper covering the rest of the deck up to the hatch coaming.

Doca's testimony as to the condition of the passageway was supported by photographs of the area and the testimony of eyewitnesses Edward Kozak, ship foreman for Pittston, and George Stafford, gangway man on the Costa Rica on the day of the accident. Kozak and Stafford, whom I found to be highly credible witnesses, also testified that the debris had been in the passageway when they reported to work on the morning of the 23rd. Although Kozak stated that he had informed both the ship's duty officer and Pittston's supervisor of the debris at about 9:30 that morning, he and Stafford agreed that no cleaning of the passageway was undertaken prior to Doca's arrival.

The accident of which Doca complains occurred as he attempted to cross through the obstructed passageway. According to his testimony at trial, Doca started to walk where it appeared that only dunnage paper covered the deck. As he did so, he

stepped on an object underneath the paper, causing his ankle to give way and him to fall and strike his head against the hatch coaming.

Stafford, who was an eyewitness to the accident, quickly ran to Doca and found him lying on the deck in a dazed condition. Stafford, along with a number of Pittston employees who also came to Doca's aid, cleared the paper away from around Doca and found his foot resting on the deck next to a turnbuckle which held the pipe against the ship's outer railing. After being shown the turnbuckle, the apparent object on which he had stepped, Doca was assisted off the ship to receive medical attention.

LIABILITY OF THE SHIPOWNER

This action is brought pursuant to the Longshoreman's and Harbor Workers' Compensation Act, [hereinafter referred to as "LHWCA"], as amended. 33 U.S.C. 901, *et seq.* It is generally accepted that the 1972 amendments to the Act were intended to establish land based principles of negligence as the standard of care for vessels boarded by dock workers. *See, e.g., Napoli v. Transpacific Carriers Corp.*, 536 F.2d 505 (2d Cir. 1976). Accordingly, it has been held that, analogous to the responsibilities of a landowner, a shipowner owes to business invitees, such as Doca, the duty to provide a reasonably safe place to work and consequently must exercise reasonable care to correct non-obvious unsafe conditions of which he has actual or constructive notice. *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682 (2d Cir. 1978); see Restatement (Second of Torts) §343. Liability has been imposed even with respect to open and obvious hazards of which the shipowner has knowledge where the hazard was of such character as to be unavoidably dangerous. *Napoli, supra;* see Restatement (Second) of Torts §343A.

The decisions in this Circuit, however, have been markedly inconsistent with respect to the shipowner's responsibility for unsafe conditions in areas of the ship taken over by stevedoring

operations. One line of cases holds that the concept of a shipowner's non-delegable duty to provide a safe place to work, akin to the seaworthiness doctrine, was abolished by the 1972 LHWCA Amendments and that the shipowner need not supervise the stevedore's operations and may rely upon the stevedore to eliminate hazards of which it has notice. *See Napoli, supra; Cox v. Elota Mercante Grancolombiana,* 577 F.2d 798 (2d Cir. 1978); *Cannizzo, supra,* dissenting opinion of J. Friendly; *Lubrano v. Royal Netherlands S.S. Company,* 572 F.2d 364 (2d Cir. 1978), dissenting opinion of J. Moore. Opposed to these are decisions suggesting that a shipowner's failure to correct an unsafe condition of which it has knowledge is negligent regardless of whether the condition was in a workplace under the stevedore's primary control. *Lopez v. A/S D/S Svendborg,* 581 F.2d 319 (2d Cir. 1978); *Canizzo, supra.* Fortunately, I need not in this case attempt to resolve the uncertainties in Circuit law since I believe that Marina was negligent under either formulation of the shipowner's standard of care.

As stated above, there was credible testimony that the ship's crew had been notified of the debris around hatch # 4. While the crew may not have had actual knowledge of the turnbuckle that lay underneath the scrap dunnage paper, they are certainly chargeable with such knowledge given that the passage had been obstructed for at least a day prior to Doca's accident.

Since Marina must be regarded as having been aware of the concealed turnbuckle, its failure to eliminate the hazard was negligent, even under the most generous interpretation of the law, unless it was entitled to assume that Pittston would remove the debris. Not surprisingly, Marina argues that such an assumption on its part was fully justified. In support of its position, Marina points to the testimony of Pittston's foreman Kozak, which I found to be credible, that Pittston had actual notice of the dangerous condition and that at least some Pittston employees were working on the top of the deck around hatch #4. Marina contends that these facts make plain that Pittston had a legal

duty to remove the debris, in accordance with Occupational Safety and Health Administration [hereinafter referred to as "OSHA"] regulations requiring stevedores to keep working areas "reasonably clear of lines, bridles, dunnage and all other tripping or stumbling hazards." 29 C.F.R. 1918.91(a).

Marina's presentation of the facts and applicable law is crucially incomplete, however, for it disregards the evidence of an agreement between Pittston and Marina concerning removal of refuse produced by stevedoring operations. Kozak's testimony, which was supported by past bills from Pittston to Marina, was that Pittston would not remove stevedoring debris unless separately paid for the service, and that otherwise the job fell to the ship's crew. Since there was no evidence at trial that Pittston had contracted to clean on the day Doca was injured, Marina was iself obligated to remove the debris. Its argument that it justifiably relied on Pittston to clear the obstructed passageway is consequently without merit.

LIABILITY OF STEVEDORE

While I have concluded that Marina was responsible for clearing the offshore passageway along the ship's #4 hatch, I believe the evidence establishes that Pittston was concurrently negligent for allowing the passageway to remain obstructed. As noted above, Pittston received notice of the debris early in the morning on the day of the accident and there were Pittston employees working in the general vicinity of the obstructed passageway up to the time of Doca's accident. By failing to clear the passageway, Pittston plainly violated the OSHA regulations, referred to above, that require stevedores to keep work areas free of stumbling hazards.

Although Pittston's contract with Marina assigned responsibility for clearing the debris around hatch #4 to Marina, Pittston could not by contract avoid the duties placed upon it by OSHA regulations. This is especially true in light of the evi-

dence that Pittston allowed the passageway to remain obstructed for the better part of a day and had reason to know that Marina was delinquent in executing its responsibilities.

CONTRIBUTORY NEGLIGENCE

Marina has presented as an affirmative defense the claim that Doca was contributorily negligent for attempting to cross through the debris instead of altering his path to hatch #4. The only alternative course available to Doca, however, was along the inshore side of hatch #3 and #4. Although testimony at trial indicated that the inshore passageway was unobstructed, it was also established that routine safety procedures required use of the offshore passageway when inshore loading of cargo was underway. Cargo hoisted off of the dock over and into the ship's hatches would present an obvious threat to persons walking underneath. Since the evidence established that the Costa Rica's hatch #'s 1, 2 and 4 were loading inshore at the time of Doca's accident, the inshore passageway did not, in fact, present Doca with a reasonable alternative course.

Marina also claims that Doca was contributorily negligent for having attempted to cross through the debris without first clearing aside the dunnage paper so that he could see the deck. Such a procedure by Doca would, of course, have been safer, but Doca was required to exercise only reasonable and not the utmost care. Given that the true nature of the hazard posed by the debris was concealed, Doca's failure to stop and move aside the dunnage paper was not, under all the circumstances, negligent.

CROSS-CLAIMS

Since I have determined that Pittston and Marina were concurrently negligent and will allocate damages according to their proportionate degree of fault, the only issue remaining with respect to defendants' cross-claims is whether Marina is entitled to

indemnity from Pittston for an alleged breach of Pittston's warranty of workmanlike performance. A shipowner's right to such indemnity was first recognized in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), where the Supreme Court held that a stevedore's contract with the shipowner contains an implied warranty of workmanlike performance, breach of which entitles the shipowner to recover for any losses caused thereby. Pointing to the OSHA regulations which, as I have found, Pittston failed to observe, Marina argues that Pittston breached its warranty and must indemnify Marina for the full amount of Marina's liability to Doca as well as the cost of its defense.

An initial question with respect to Marina's claim concerns the 1972 LHWCA Amendments' elimination of the shipowner's right to indemnity as against a stevedore-employer. 33 U.S.C. §905(b). Although Pittston is not covered by the literal terms of the statute since it did not employ Doca, it is not at all clear that *Ryan* type indemnity survives even where the stevedore is not the injured party's employer. Certainly there is reason to believe that Congress did not intend that the deliberate allocation of financial responsibilities established by the 1972 Amendments should be contingent upon such fortuities as the identity of the plaintiff's employer. Moreover, decisions in this Circuit have suggested that the shipowner's right to *Ryan* type indemnity is compensation for and co-extensive with its absolute liability for shipboard safety under the seaworthiness doctrine. *See, e.g., Fairmount Ship. Corp. v. Chevron Internat'l Oil Co., Inc.*, 511 F.2d 1252 (2d Cir. 1975). Since the LHWCA Amendments eliminated the shipowner's seaworthiness obligation to harbor workers, the practical justification for *Ryan* indemnity in this case is open to question.

I need not, however, resolve this question of law, since I find that Pittston did not breach its warranty of workmanlike performance and that Marina was in any event barred from recovery by its own negligence. As discussed above, Pittston and

Marina determined between themselves the responsibility for clearing refuse from stevedoring operations. Since Pittston was not, under their agreement, required to remove the debris that caused Doca's accident, its failure to do so did not violate any provision, implied or otherwise, of its contract with Marina. The fact that Pittston's performance was not in accordance with OSHA regulations, while sufficient to support a finding that Pittston was negligent, does not establish Pittston's breach of an obligation that is contractual in nature.

Even if it could be said that Pittston did not comply with its warranty of workmanlike performance, I believe that Marina's own negligence would preclude its recovery of indemnity. While the cases evidence some uncertainty, *compare Hurdich v. Eastmount Shipping Corp.*, 503 F.2d 397 (2d Cir. 1974) *with Rodriguez v. Olaf Pedersen's Rederi A/S*, 527 F.2d 1282 (2d Cir. 1975), the law in this Circuit appears to be that recovery of indemnity is barred where the shipowner and stevedore are concurrently negligent and the shipowner was "the party 'best situated to adopt preventive measures.'" *Lopez v. Oldendorf*, 545 F.2d 836, 839 (2d Cir. 1976). The determination of which party was in the better position to prevent a hazardous condition is a factual question, *Hurdich, supra* at 401, and in this case I think it is clear that Marina had the better opportunity to remove the debris from around hatch #4. At the time of Doca's accident and for several hours before it, the bulk of Pittston's employees were working in the ship's hold, well removed from the obstructed passageway. The Marina's crew was well accustomed to removing refuse while stevedoring operations were underway, and indeed were contractually obligated to do so on this occasion. In light of these facts, Marina's claim for indemnity is defeated by its own negligence.

THE CLAIM FOR LOSS OF CONSORTIUM

Marina has argued that Mrs. Doca's claim for damages must be denied because general maritime law does not recognize an

action for loss of consortium on behalf of the wife of an injured maritime worker. As Marina has pointed out, the Second Circuit, in *Igneri v. Cie. de Transports Oceaniques,* 323 F.2d 257, *cert. denied,* 376 U.S. 949, 84 S.Ct. 965, 11 L.Ed.2d 969 (1963), held that compensation for loss of consortium was not available to wives of maritime workers. Although a decision on point by the Court of Appeals for this Circuit would ordinarily be dispositive of the issue, I must conclude, essentially for the reasons ably stated in Judge Lasker's opinion in *Giglio v. Farrell Lines, Inc.,* 424 F.Supp. 927 (S.D.N.Y. 1977), that *Igneri* can no longer be regarded as controlling.

The Court in *Igneri* reached its conclusion after an extensive review of maritime as well as common law principles concerning a wife's right to damages for loss of consortium. As Judge Lasker observed in *Giglio,* however, there have been many changes in this area of the law since 1963. Most significantly, the Supreme Court, in *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), held that the wife of a seaman could sue for loss of society in a maritime wrongful death action. After noting that the majority of state wrongful death statutes recognized such a claim, the Court concluded that its decision served to "shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction." *Id.* at 588, 94 S.Ct. at 816.

No distinction of substance separates claims for loss of society and loss of consortium, and although the Fifth Circuit has held that a wife's consortium claim will be recognized in a maritime wrongful death action but not in a maritime action for personal injuries only, *Skidmore v. Grueninger,* 506 F.2d 716 (1975) and *Christofferson v. Halliburton Co.,* 534 F.2d 1147 (1976), it seems to me clearly more consistent with the rationale of *Gaudet* to permit the consortium claim in either case. Accordingly, Mrs. Doca is entitled to recover damages for loss of consortium attributable to her husband's accident.

DAMAGES

Credible medical evidence at trial established that Doca suffered a cerebral concussion and a cervical spine injury as a result of his fall on the Costa Rica. Although these injuries were unquestionably serious, it was the opinion of each of the doctors who examined Doca that his present complaints, which include headaches, dizziness, pain in the shoulder and neck area, numbness in the hands and sexual dysfunction, have no clear neurological basis but are instead attributable to a post-traumatic conversion reaction, a conversion of his anxiety concerning his injuries into specific physical symptoms. It is important to note, however, that Doca's physical symptoms are no less real to him for the fact that they result from a post-traumatic conversion.

Along with his physical symptoms, Doca suffers from anxiety, depression, insomnia and loss of sexual appetite, which I find to be directly attributable to the accident on the Costa Rica. The combination of Doca's physical and mental ailments will, again according to credible medical evidence, likely prevent him from ever working again or from engaging in most normal recreational activities.

The parties have stipulated that Doca's medical and hospital expenses as a result of the accident are $3,697.13. In the three years prior to his accident, Doca worked an average of 47 hours a week. Assuming that he would have continued to work at that pace and taking into account subsequent adjustments in his wage scale, Doca's lost earnings from the time of the accident to the date of trial amount to $97,792.00.

Since I find that Doca will be unable to return to productive work, he is also entitled to recover for future loss of earnings. Born on May 24, 1926, Doca has a work expectancy of age 65 or approximately 12 years from the date of trial. He is thus entitled to recover $352,560, representing his future loss of earnings considering both probability of continued inflation and a discount to present value.

In calculating damages for Doca's past and future pain and suffering, I have been mindful of his previous work accident in 1950. After years of effort, Doca overcame the paralysis that followed that accident and rehabilitated himself to the point where he was able again to lead a relatively normal work and home life. Although Doca's accident aboard the Costa Rica did not cause injuries nearly as severe as those he suffered in 1950, its impact on his spirit and state of mind was understandably similar since it left him once again disable and effectively cancelled out the great effort of his earlier rehabilitation. The medical evidence at trial indicated that prospects for improvement in either Doca's mental or physical condition are doubtful, and that he faces the likelihood of substantial physical and mental pain for the rest of his life. Taking all of these factors into account, I find that Doca is entitled to $200,000 as compensation for his pain and suffering, both past and future.

The final item of damage to be determined is Mrs. Doca's claim for loss of consortium. I found credible Mrs. Doca's testimony that she and her husband have been unable to resume normal marital relations since his accident. There was also medical evidence that Doca suffers from impotency and a loss of sexual appetite as a result of the accident. In addition to the impairment of their sexual relationship, the accident has also greatly limited the Doca's normal social activities and placed a general strain on their life together. On the basis of these factors, I find that Mrs. Doca is entitled to $15,000 as compensation for her loss of consortium.

Settle judgment on seven (7) days' notice. The judgment will apportion damages with Marina to pay 90% thereof and Pittston to pay 10% which percentages accord with the proportionate degree of fault of each.

APPENDIX C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of October, one thousand nine hundred and eighty.

Present:

HON. WILFRED FEINBERG,
Chief Judge

HON. JON O. NEWMAN

HON AMALYA L. KEARSE
Circuit Judges,

JACK A. DOCA and FANNIE C. DOCA,

Plaintiffs-Appellees

v.

MARINA MERCANTE NICARAGUENSE, S.A. and PITTSTON STEVEDORING CORP.,

Defendants-Appellants

79-7626
79-7637

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part, vacated in part and the action be and it hereby is remanded to said district court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

By:
ARTHUR HELLER
Deputy Clerk

APPENDIX D

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of January, one thousand nine hundred and eighty-one.

Present:

HON. WILFRED FEINBERG,
Chief Judge

HON. JON O. NEWMAN
HON AMALYA L. KEARSE
Circuit Judges,

JACK A. DOCA and FANNIE C. DOCA,

Plaintiffs-Appellees

v.

MARINA MERCANTE NICARAGUENSE, S.A. and PITTSTON STEVEDORING CORPORATION.

79-7626
79-7637

A petition for a rehearing having been filed herein by counsel for the appellant Pittston Stevedoring Corporation.

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

By:
ROLANNE HENRY
Deputy Clerk

Statutes Involved

UNITED STATES CODE, Title 33

§902 Definitions

(3) The term "employee" means any person engaged in maritime employment including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

UNITED STATES CODE, Title 33:

§905 Exclusiveness of Liability.

(a) The liability of an employer prescribed in Section 904 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

Statutes Involved

UNITED STATES CODE, Title 29

§652 Definitions

(5) The term "employer" means a person engaged in a busisiness affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.

(6) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam and the Trust Territory of the Pacific Islands.

UNITED STATES CODE, Title 29:

§653 ***workmen's compensation law or common law or statutory rights, duties, or liabilities of employers and employees unaffected.

(b)(4) Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases or death of employees arising out of, or in the course of employment.

CODE OF FEDERAL REGULATIONS, Title 29

§1918.91 Housekeeping

(a) Weather deck and working areas shall be kept reasonably clear of lines, bridles, dunnage and all other loose tripping or stumbling hazards.

No. 80-1537

APR 8 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PITTSTON STEVEDORING CORP.,

Petitioner,

—against—

JACK A. DOCA and FANNIE C. DOCA,
MARINA MERCANTE NICARAGUENSE, S.A.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

MORRIS CIZNER
Counsel for Respondents
160 Broadway
New York, New York 10038

The Questions Presented

The questions presented are predicated on the following facts:

Plaintiff, a checker, was employed by Hamilton which supervised, directed and controlled plaintiff in his work, he was on their payroll, and they paid his salary, hired and had the right to fire him, provided him with Workmen's Compensation benefits, and at the time of the accident sent him on board ship to perform certain checking work in Pittston's work area.

Pittston had a stevedoring contract with shipowner to perform the work of loading and unloading cargo and a terminal service agreement to perform clerking and checking work. Pittston sub-contracted the clerking and checking work to Hamilton and performed only the work of loading and unloading cargo. Pittston's supervisor joined Hamilton in sending plaintiff on board ship to their work area to perform checking work but not their work of loading and unloading cargo. Pittston did not direct or control plaintiff in his work and stipulated on trial that he was the employee of Hamilton.

Pittston's work area was in extremely dangerous condition with obstructions, traps and tripping hazards in the area which could not be avoided by plaintiff. They knew it was dangerous for them to work there and complained about the danger to the ship's crew but did not correct same. They did not inform Hamilton of the danger before they participated in sending plaintiff on board because Hamilton had nothing to do with the conditions on board the vessel. They did not correct the dangerous condition nor did they notify or warn plaintiff thereof. Plaintiff tripped and fell and was injured by reason thereof.

The Circuit Court stated plaintiff was a *business invitee* on board ship and Pittston had the duty to exercise reasonable care under the circumstances to furnish a safe place to work and to remove tripping hazards. Under the facts in the case the scope of Pittston's duties was the same as the scope of the duty owed to their employees and OSHA Regulations set the standard of care required of Pittston and the scope of their duty.

The questions presented are:

1. On the facts in this case in view of the duty to exercise reasonable care owed by Pittston to plaintiff and the scope of such duty being the same as that which runs to their employees, does Pittston cease being a third party and now become plaintiff's employer under the LHWCA and, therefore, under Section 905(a) cannot be sued as a third party by plaintiff?

2. If plaintiff is not an employee of Pittston for purposes of Section 905(a) of the LHWCA does Pittston nevertheless have a duty to provide plaintiff with a safe place to work and to act in a reasonable manner under the circumstances?

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No. 80-1537

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PITTSTON STEVEDORING CORP.,

Petitioner,

—against—

JACK A. DOCA and FANNIE C. DOCA,
MARINA MERCANTE NICARAGUENSE, S.A.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

1. *Facts*

Shipowner entered into contracts with Pittston, the Petitioner, who obligated themselves to perform stevedoring work of loading and unloading vessels and to perform work of clerking and checking cargo. Pittston sub-contracted its clerking and checking contract to Hamilton and retained only its loading and unloading work.

Pittston was the contractor and Hamilton Terminal was its sub-contractor. The parties were so designated in the Terminal Service Agreement. Plaintiff was employed by Hamilton as a checker and stowage clerk and in the course of the performance of his work was lawfully on the vessel. His work on the vessel was to go to the hatches where the

longshoremen were working, speak to the hatch boss and "check out" the cargo of pipe in the hatches as to type and destination. Unmarked pipe was found on the pier and it was to match up the pier cargo with the pipes already stowed in the hatches that necessitated his being on board ship and going to Hatch No. 4. It was necessary for him to look into the hatch.

Pittston knew he was going on board to go to their work area. He went on board at the request of a Hamilton supervisor joined in by a Pittston supervisor.

Pittston was working in Hatch No. 4 and necessarily used the top deck about same as both a means of going to and coming from the hatch. The deck was also a place of work since deckmen were required to work offshore when rigging up and resetting the booms to a different position over the hatch. Thus, Pittston, was an occupier of Hatch No. 4 and the deck about same.

Pittston's work area was dangerously obstructed with tripping hazards. Plaintiff tripped and fell sustaining very severe injuries.

2. *Pittston's Duty to Plaintiff*

Thus, Pittston had a special relationship with plaintiff. (Sec. 302, Restatement of Torts, Second). Hamilton was hired by Pittston to perform certain work and plaintiff was employed by Hamilton. Plaintiff became a business invitee of Pittston and was in their work area when he was injured.

Prosser, Law of Torts, 4th Edition, Ch. 10, § 61, pages 385, et. seq. states Pittston's duty as follows:

> "—those who enter premises upon business which concerns the occupier, and upon his invitation express or implied, the latter is under an affirmative duty to pro-

> tect them, not only against the dangers of which he knows, but also against those which with reasonable care he might discover." (385)

A typical example is "independent contractors doing work on premises and the workmen employed by such contractor as well as a large and miscellaneous group of similar persons who are present in the interest of the occupier as well as of their own." (386). The special obligation towards invitees "extends to the entrance to the property, and to a safe exit after the purpose is concluded; and it extends to all parts of the premises to which the purpose may reasonably be expected to take him, and to those which are so arranged as to lead him reasonably to think that they are open to him." (391-392)

The duty is to exercise reasonable care, but

> "—the obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm. The occupier must not only use care not to injure the visitor by negligent activities, and warn him of latent dangers of which the occupier knows, but he must also inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use." (393)

It should also be noted that under the common law a general contractor has the duty of providing a safe place to work, the duty being to both make the premises safe and to keep them safe. The premises are made safe by discovery of dangers ascertainable through reasonable diligence and remedying them or warning against them. They are kept safe by forebearance from creating new conditions of dan-

ger. The duty runs to all persons employed on the premises without regard to whether they are employees of the party in control or in possession. The duty is non-delegable. The duty owed to workmen is analogous to that owed to any business invitee and it is to make safe, by reasonable care, the places of work provided by him and the ways and approaches to such places to work. *Employer M.L.I. Co. of Wis.* v. *DiCesare & M.C.C. Corp.*, 194 N.Y.S.2d 103 (1959) 9 A.D.2d 379; *Wohlfron* v. *Brooklyn Edison Co., Inc.*, 238 App. Div. 463, 265 N.Y.S. 18 *aff'd*, 263 N.Y. 547; *Allen* v. *Cloutuer Const. Corp.*, 44 N.Y.S.2d 290 (1978); 405 N.Y.S. 2d 630.

Here, Pittston knew of the dangerous condition of the deck when they came to work and requested the ship to have the condition corrected. The request was made at about 9:00 A.M. The ship did not correct the condition before the accident at 2:30 P.M. and Pittston made no attempt to correct same either. Their own longshore employees had to come and go and perform their work on deck walking on top of the dangerous condition. They knew of the danger but did not tell anybody in Hamilton of the condition of the deck offshore side No. 3 and 4 hatches because "they had nothing to do with the ship so I didn't tell them."

Knowing of the extremely dangerous condition they invited plaintiff, or acting together with Hamilton's supervisor, sent plaintiff on board ship to their work area.

The fact that Pittston owes Doca the same duty and degree of care as it owes to its own employees does not make Doca its employee! A contractor has always been required to exercise the same degree of care and owes the same duty towards an employee of its sub-contractor as it must exercise towards its own employee. This is so both under the common law and in maritime law. The opinion

of the Circuit Court states that the plaintiff is in effect entitled to the same care and Pittston owes him the same duty as they owe to their own employees. It does *not* make a finding of fact that plaintiff is Pittston's employee.

The case of *Vanderlinden* v. *Lorentzen,* 139 F.2d 995 (2d Cir. 1944) is remarkably similar in fact to our case. A Checker, a stevedore, a shipowner, and an unsafe way were also involved. Plaintiff was a Checker in the employ of one who was a sub-contractor of the stevedore. Cargo was to be discharged from a lighter. To get to the lighter, stevedore's employees and business visitors were required to descend the ship's ladder which was defective. Plaintiff was injured while descending said ladder. Plaintiff sued both shipowner and the stevedore, his employer's contractor, for negligence. The Court stated:

> "We hold that both defendants were under a duty to use reasonable care to see that the plaintiff had a safe approach to the deck of the lighter and that the ladder was safe. Vanderlinden was a 'business visitor' of both because he went upon the lighter in the interest of both, and neither could devolve its duty to him upon the other, however much they might agree upon its final incidence as between themselves, or whether the law would do so without agreement." (996-997)

The OSHA Regulations set forth the standard of care required to be complied with for the benefit of the class of persons sought to be protected.

In *Lindler* v. *District of Columbia,* 502 F.2d 495 (C.C.D.C. 1974) (LHWCA case), a negligence action was brought against the defendant for injuries sustained by workmen who were employed by defendant's independent contractor. The Court stated "— — we hold that, as a matter of law the District may be held liable to its contractor's employees

who are injured in the performance of inherently dangerous work." (499) The Act must be construed liberally in favor of the injured employee and narrow statutory construction should *not* deprive the injured employee of either his compensation or his claim in damages against third parties. The statute was not designed to protect third parties from suit. The Court then held that where the District contracts for the performance of inherently dangerous work, it has a duty to guard against injuries to third persons which may result therefrom.

Furthermore, the objective of the Longshoremen's and Harbor Workers' Act and its amendments is to encourage safety aboard vessels. *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256 (1979). It was the intention of Congress that a set of regulations containing safety standards be set up which would constitute a standard of conduct required of employers. The responsibility for complying with the regulations is placed upon an "employer" as defined in 29 CPR Section 1918.3(c). The latter section states that "The term 'employer' means an employer of whose employees are employed in whole or in part in longshoring operations or related employments as defined herein." Section 1918.3(j) defines "related employments" and includes checkers. Section 1918.2(b) states that where a person (shipowner, operator, etc.) is *acting as employer,* he has the responsibility of complying with or the performing of duties required by the Safety Regulations.

Thus the employers and those acting as employers are charged with responsibility of complying with the regulations. The class of persons for whose benefit the Safety Regulations were promulgated were longshoremen and those in related occupations on board ship including checkers. Taking Congressional intent and the objective of the

Statute into consideration, plaintiff, a checker, employed by Pittston's sub-contractor performing related work in longshore operations, is one whose health and safety is sought to be protected by the Regulations.

Pittston's failure to comply with the standard of conduct required by the Safety Regulations is negligence. Having the duty to furnish and maintain a safe place to work and safe means of going to the place of work, Pittston is liable for damages that may result.

Pittston's claim that such violation of the Regulations cannot be the basis of stevedore's liability is erroneous. Such claim pre-supposes that there is no duty owing to plaintiff. This belief is not correct as set forth herein.

3. *The Opinion of the Circuit Court*

That fact that Pittston owes plaintiff the same duty and degree of care that it owes to its own employees does not make him its employee for the purposes of Workmen's Compensation benefits under 33 U.S.C. 901 et seq. The Circuit Court held substantially as hereinbefore set forth. It did find that Pittston hired Hamilton and plaintiff was Hamilton's employee. Pittston was required to keep their work area free of tripping or stumbling hazards (29 C.P.R. 1918.91[a]). Since "it continued working without making sure the deck was clean, it exposed itself to liability for violation of a statutorily established standard". (4a). The Court stated that because of the relationship *between Hamilton and Pittston,* and because of the participation of Pittston in having plaintiff go on board ship to its work area made Doca's relationship to Pittston "effectively that of an employee, *for purposes of the scope of the duty* based on the OSHA Regulations". (5a) (emphasis supplied)

Thus the Court held that Pittston owed a duty of care to the plaintiff. The Court also held that because of the

relationship between the parties and their acts, the *scope* of Pittston's duty was to be measured by the OSHA Regulations. Put another way, the Court held that the scope of the duty owed to plaintiff is the OSHA Regulations since his relationship to Pittston for such purposes was effectively the same as an employee.

The Court does *not* make a finding of fact that plaintiff is Pittston's employee nor did the Court make a finding that plaintiff was "in effect, a borrowed servant" (p. 4, Petition) as claimed by Pittston, but when Pittston states in its Petition (p. 8) that the Second Circuit "found as a fact, based on the District Court record, that Jack Doca was an employee of Pittston" that is not only a distortion but a misstatement made with the knowledge that it is not correct.

Petitioner furthermore knew that the Circuit Court did not view plaintiff as their employee since the opinion described plaintiff's position as that of a *business invitee.* (5a Petition).

It should also be noted that on the Petition for Rehearing in the Circuit Court briefs were requested of all parties and respondent took the very same position as set forth herein. The Circuit Court denied the Petition. Obviously respondents' interpretation of the meaning and import of the Court's opinion was correct.

Reasons for Denying the Petition for a Writ of Certiorari

The Petition here should be denied since it is based upon a false issue, misstatements of fact and law, distortion of the Second Circuit Court of Appeals opinion here, irrelevant citations and erroneous reporting of case holdings. It is a frivolous application and should not be countenanced.

Petitioner's only obvious objective is to delay payment of a judgment. The trial was held in January 1979; the Judge's opinion was filed July 11, 1979. To date there has been excessive delay and it is unfair to the plaintiff. Losses have been and are to be figured as of the date of trial. The amounts are to be discounted, in part, as of the date of trial. To continue delay here is to deprive plaintiff of due process.

1. *False Issue Raised by Petition*

Petitioner now argues that when an "OSHA employment nexus" is found, the injured plaintiff cannot sue the one violating OSHA Regulations since the violation determines when the exclusive remedy of Sec. 905(a) of the LHWCA becomes operative. Such inverted reasoning is hardly worthy of comment. It was the LHWCA which authorized issuance of the Safety & Health Regulations for longshoring (29 CFR 1918 et seq.) not the reverse.

Furthermore, Petitioner's statements that "it is clear" that respondent is an employee of Pittston as defined by both 29 U.S.C. § 652(b) (OSHA) as well as 33 U.S.C. Sec. 902(3) (LHWCA) is both not clear and not correct. The sections quoted in the Petition from 29 U.S.C. § 651 et seq. are irrelevant to maritime employment. 33 U.S.C. Sec. 902(3) does not make plaintiff an employee of Pittston under the Act compelling application of Sec. 905(a) to our law suit.

What such "nexus" actually is meant by is far from clear. Under Petitioner's theory, every general contractor is relieved of its responsibility for failure to exercise reasonable care. Any time a third party acts in a negligent manner which is contrary to the standards set up by the Safety & Health Regulations for Longshoring (29 C.F.R. 1918 et seq.), they cannot be sued for damages. They are relieved of liability if there is any relationship between

them as third party and the injury which gives rise to a duty to exercise care. Thus, the breach of the "duty" becomes the reason for being relieved of liability if the negligent act amounts to a violation of the standard of care set up in the Regulations.

It is submitted that Pittston violated its duty owed to plaintiff based on the facts in this case. In addition, the standard of care of the Safety Regulations was not adhered to by them.

The petition confuses the application and relevancy of OSHA 29 U.S.C. 651 et seq. and LHWCA 33 U.S.C. 901 et seq. as well as the Safety & Health Regulations for Longshoring, 29 C.F.R. 1918 et seq. The confusion which petitioner generates in this case is deliberate and the product of its own inconsistencies which is most difficult to follow. On trial, Petitioner took the position that plaintiff was an employee of Hamilton, not Pittston, and so stipulated. On appeal Pittston claimed that it had no duty owing to plaintiff to exercise reasonable care and no duty under the Safety Regulations because there was not an employer-employee relationship between them. Their Reply Brief on Appeal (p. 22) sets forth their view that the lower court's "confusion" was magnified by its failure to consider that *"Bachtel* v. *Mammoth Bulk Carriers Ltd.*, 605 F.2d 438 and the OSHA Regulations create and/or impose a duty and a standard of conduct that shipowner and stevedore alike must abide by."

Bachtel (9th Cir. 1979) analyzed the application of the OSHA Regulations in a negligence suit and concluded that the *Provenza* v. *American Export Lines, Inc.*, 324 F.2d 660 (4th Cir. 1963) and *Venable* v. *A/S Det. Forenede Dampskibselskab*, 399 F.2d 347 (4th Cir. 1968), decisions as well as the Opinion in *Reyes* v. *Vantage S.S. Co., Inc.*, 558 F.2d

238 (5 C.A. 1977) were good law. (445). See also *Johnson* v. *A/S Ivarans Rederi,* 613 F.2d 334 (1st Cir. 1980). (OSHA Regulations will continue to apply to all parties and may define the appropriate standard of care).

In *Reyes* v. *Vantage S.S. Co., Inc.,* 558 F.2d 238 (5 C.A. 1977), the Court pointed out that "the law is well established that violations of a statute which is intended to protect the class of persons to which a plaintiff belongs against the risk of the type of harm which has in fact occurred is negligence in itself." (242)

2. *The Non-Existent Conflict Between Circuits Under the Facts Presented*

The Circuit Court here did not apply Sec. 905(a) of 33 U.S.C. simply because it was not applicable nor relevant. The facts in evidence did not show respondent to be an employee of Pittston under the LHWCA so as to deprive him of his right to sue Pittston as a third party. Despite the foregoing, Petitioner finds the Second Circuit in our case to be in direct conflict with both the 5th and 8th Circuit Courts of Appeal. The four cases cited by them on page 5 of the Petition do not show any conflict as claimed and are irrelevant to Petitioner's false issue in this case.

In *Jeter* v. *St. Regis Paper Co.,* 507 F.2d 973 (5th Cir. 1975) relied upon by Petitioner, the defendant contracted as plaintiff's employer to paint a silo. The employer was an independent contractor and supplied its own equipment and employees. In the course of the use and handling of a scaffold plaintiff fell therefrom and was injured. Defendant did not control the physical conduct of the performance of the work nor did it reserve any right to do so. Under the Mississippi State compensation statute there was no duty of care on such facts running from the defendant to plaintiff, an employee of an independent con-

tractor. This was not a maritime case and reference therein was to OSHA 29 U.S.C. Sec. 651(b). On the facts in that case it was held that no duty arose in plaintiff's favor. This Section of the Act is not applicable to maritime employment and the fact situation is entirely different from that found in our case.

In *Thibodaux* v. *Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978) cert den. 442 U.S. 909, 99 S.Ct. 2820, 60 L.Ed. 2d 274 (1979), plaintiff did not engage in maritime activity and so did not come under the LHWCA for compensation purposes. The Court commented that if he were so engaged then the question arises as to whether he is a "borrowed employee" of defendant. The Louisiana Workmen's Compensation Act provides for compensation as an exclusive remedy because the State Statute designated defendant as principal. What constituted a borrowed employee was not disclosed. A death action under General Maritime Law was permitted to proceed despite the exclusive remedy provision of the State Law.

Beaver v. *Jacuzzi Brothers, Inc.*, 454 F.2d 284 (8 Cir. 1972), a case cited as one in conflict with ours, predates *Marshal* v. *Knutson Construction Co.*, 566 F.2d 596 (8 Cir. 1977) and involves the interpretation of the Arkansas Workmen's Compensation Law. The Court found plaintiff to be an employee of a temporary employer "within the meaning of the Workmen's Compensation Act" and "the predicate for the finding was the right of control of the performance of the work of the temporary employee". (285).

More to the point and the issues involved here as viewed by the 5th and 8th Circuits are the following cases:

Reyes v. *Vantage S.S. Co., Inc.*, 558 F.2d 238 (5th Cir. 1977) which has been discussed hereinbefore. In that case,

Marshal v. *Knutson Construction Co.*, 566 F.2d 596 (8 Cir. 1977) is cited with approval. In the latter case the Circuit Court stated that a general contractor on a construction site will be held liable for violation of OSHA 29 U.S.C. Sec. 654(a)(2) even if the violation is that of one of its sub-contractors; that the general contractor is responsible under OSHA for violations of safety standards set forth in the Federal Regulations. The Circuit Court (8 Cir.) stated:

> "Furthermore, the duty of a general contractor is not limited to the protection of its own employees from safety hazards, but extends to the protection of all the employees engaged at the worksite. *Id.; Anning-Johnson Co., supra* at 24,784." (599)

The Court held that this is so even though OSHA states that each employer shall comply with occupational safety and health standards promulgated under the Act.

Obviously the 5th and 8th Circuits and the opinions cited by Petitioner are not in conflict with our case.

3. *Plaintiff Was Not Pittston's Special Employee*

Recognizing the probability that they are in error in claiming that Doca was found to be "in fact" an employee of Pittston, Petitioner now claims he was working under the control of Pittston and that he was a special or temporary employee of that company. They argue that, therefore, no action can be brought by plaintiff against them.

To achieve their desired result, Pittston treats their contract with Hamilton as meaningless; ignores stipulations in the action; treats the testimony of Pittston's officer (Chiarello) as merely stating a legal position not under oath to be walked away from with impunity.

The parties stipulated in this case that Doca was a checker and stowage clerk employed by Hamilton. The stevedoring work was performed by Pittston. The Secretary of Pittston, Chiarello, testified to the contract between his company and Hamilton and stated that they had two contracts with shipowner—one for loading and unloading of the vessel, and the other for terminal service, namely, clerking and checking cargo. Pittston sub-contracted the terminal-service agreement to Hamilton and on the day of the accident Pittston did the loading and discharging work and Hamilton performed the clerking and checking operation.

Doca testified that he was employed by Hamilton exclusively for over five years; when he went onto the ship he was working in the capacity of a stowage clerk for Hamilton; that he would go onto a ship only if he received such instructions from his superintendent (Hamilton) to check the stowage of cargo on board ship. The deckmen, foreman and hatch bosses on deck when the accident happened were not co-employees of his and they worked for Pittston. These were the people who were working on board ship loading the vessel.

The record amply shows that Doca was on Hamilton's payroll and he was paid by them. He received Workmen's Compensation from them. His job duties were not those of loading and unloading but those of a checker and stowage clerk. He did not receive any direction from Pittston, was not under their control, not on their payroll and never considered to be their employee.

By no stretch of the imagination could any reasonable person say plaintiff Doca was a special employee of Pittston.

4. *Misrepresentation of Cases in Petition*

Petitioner misstates the sense and import of various cases cited by them. For example:

Fallone v. *Misericordia Hospital, et al.*, 23 A.D.2d 222, 259 N.Y.S.2d 947, *aff'd*, 17 N.Y.2d 648, is cited for the proposition that where a borrowed servant relationship exists the employer cannot be sued. The facts in that case defeat Pittston's argument. In *Fallone*, plaintiff was an employee of a joint venture; was paid by the joint venture; was on the payroll for employees of the joint venture; Workmen's Compensation Insurance was procured by the joint venture and defendant, Industrial Engineering Co. was one of the companies comprising the joint venture. At the time of the accident and for several days prior thereto *plaintiff was working under the direction of the foreman of Industrial Engineering Co.* It was held that he was a special employee of Industrial because of such direction and under the circumstances could not sue that defendant.

Matter of DeNoyer v. *Cavanaugh*, 221 N.Y. 273. A sentence therefrom is quoted in the Petition. The Court was, however, not informed that the sentence following reads:

> "If the men are under the *exclusive control* of the special employer in the performance of work which is part of his business, they are, for the time being, his employees." (275)

Thus, that case calls for exclusive control by stevedore of Doca in the work of loading and discharging to have him designated as a special employee. That is not the case here.

Likewise, *The Standard Oil Company* v. *Anderson*, 212 U.S. 215 (1909) which is cited p. 4 Petition emphasizes that sole control and direction is a requisite for a finding of

borrowed servant. In our case there is neither control, direction or superintendence of plaintiff by Pittston.

Johnston v. *International Freighting Corporation,* 274 App. Div. 728, 87 N.Y.S.2d 297. Plaintiff was hired as a Harbor Master by one company and worked under their sole direction and direct supervision. He did no stevedoring work. The stevedore was held not liable to pay Workmen's Compensation as an employer.

It becomes fruitless and pointless to repeat all of the citations and claims advanced by Pittston to show the irrelevancy to the issue raised or their error. Suffice it to say that there are no facts in the record of this case showing plaintiff to have been working under the exclusive control or any direction or control of Pittston. Doca was not their employee in the sense that deprives him of his right to sue them as a third party.

CONCLUSION

There is no merit to Petitioner's claim and there is no legal or equitable reason to grant Pittston's Petition herein.

Respectfully submitted,

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